

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT SANDERSON, JR,

Plaintiff–Appellant,

v

ANCHOR PACKING CO, GARLOCK, INC,
PITTSBURGH CORNING CORP, FIBREBOARD
CORP, ARMSTRONG WORLD INDUSTRIES,
INC, FLEXITALLIC GASKET CO, A. P. GREEN
REFRATORIES CO, NATIONAL GYPSUM CO,
UNITED STATES GYPSUM CO, QUIGLEY CO,
BABCOCK & WILCOX CO, BROWN
INSULATION CO, OWENS CORNING
FIBERGLASS CORP, W. R. GRACE & CO -
CONN., GENERAL REFRATORIES,
FLINTKOTE, GREENE, TWEED & CO, A. W.
CHESTERTON CO, DETROIT EDISON CO, AND
STANDARD FUEL ENGINEERING CO,

Defendants-Appellees,

UNPUBLISHED

June 17, 1997

No. 185003

Monroe Circuit Court

LC No. 92-000034 NP

JAMES E. LAJINESS AND MARILYN LAJINESS,

Plaintiffs–Appellants,

v

DRESSER INDUSTRIES, INC, ARMSTRONG
WORLD INDUSTRIES, INC, GAF CORP,
FLEXITALLIC GASKET CO, A. P. GREEN
REFRATORIES CO, NATIONAL GYPSUM CO,
UNITED STATES GYPSUM CO, QUIGLEY CO,

No. 185004

Monroe Circuit Court

LC No. 94-002197 NP

* Circuit judge, sitting on the Court of Appeals by assignment.

BABCOCK & WILCOX CO, BROWN
INSULATION CO, HI TEMP PRODUCTS, INC,

OWENS CORNING FIBERGLASS CORP,
PITTSBURGH CORNING CORP, STANDARD
FUEL ENGINEERING CORP, A. W.
CHESTERTON CO, W. R. GRACE & CO -
CONN., GENERAL REFRACTORIES, NORTH
AMERICAN REFRACTORIES CO, GENERAL
ELECTRIC CO, GREENE, TWEED & CO, F.B.
WRIGHT CO,, ARTHUR J. PEACOCK & CO,
SCHAD BOILER SETTING CO, PRUDENTIAL
SUPPLY CORP, ATLAS ASBESTOS CO, ATLAS
TURNER, INC, LAMONS METAL GASKET CO,
SEALITE, INC, PLIBRICO CO, RAPID
AMERICAN CORP AND DETROIT EDISON CO,

Defendants-Appellees.

Before: Young, P.J., and Corrigan and M.J. Callahan*, JJ.

PER CURIAM.

This consolidated appeal involves asbestos-related products liability claims brought by plaintiff Robert Sanderson Jr. (case 185003) and James Lajiness, (case 185004) pipefitters who were exposed to asbestos in the course of their employment. Plaintiff Marilyn Lajiness is James's wife. Defendants-appellants moved for summary disposition of plaintiffs' claims on the basis that the applicable statutes of limitations had run. The trial judge agreed, and granted defendants summary disposition pursuant to MCR 2.116(C)(7). We affirm the grant of summary disposition against Mr. and Mrs. Lajiness in case 185004, and reverse the dismissal of Sanderson's claims in case 185003.

I.

Plaintiff Sanderson argues that the trial judge erred by considering defendants' motion for summary disposition despite the fact that the motion was filed following the cut-off date set by the trial court's scheduling order. Plaintiff cites no authority in support of his position so we deem the issue abandoned on appeal. *Goolsby v City of Detroit*, 449 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Vugterveen Systems Inc v Olde Millpond Corp*, 210 Mich App 34, 47; 533 NW2d 320 (1995).

II.

Sanderson next argues that the trial court erred in granting defendants' motion for summary disposition because there was a genuine issue of material fact regarding when he discovered or should have discovered his injuries. We agree.

The limitations period for Sanderson's claims was 3 years from the date those claims accrued. MCL 600.5805; MSA 27A.5805, MCL 600.5827; MSA 27A.5827. Sanderson's cause of action accrued on the date he knew or should have known of his asbestosis. *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 304-305, 319; 399 NW2d 1 (1986).

Sanderson's proffered affidavit states that he did not learn of his asbestosis until a March 1989 meeting with William Cudney, an investigator working for plaintiffs' lawyer. Sanderson's affidavit runs counter to his own deposition testimony that a doctor or x-ray technician told him he had a "very slight case of asbestosis" following an x-ray taken February 11, 1989. Plaintiff cannot rely upon this affidavit to create a genuine issue of material fact. *Kaufman & Payton v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). However, even without the affidavit, an issue of fact remains whether Sanderson's complaint was filed within the 3-year limitations period. Sanderson's complaint was filed February 13, 1992. The x-ray which revealed his asbestosis was taken February 11, 1989. While Sanderson's deposition testimony shows that, as a result of his February 11, 1989 x-ray, he learned of his asbestosis from a physician or x-ray technician prior to his March 1989 meeting with Cudney, the deposition does not temporally fix the actual date Sanderson was so informed. It *may* be most probable that Sanderson was advised of his condition on the day of his x-ray; however, there is no evidence that he actually received the advice on that date or any other date outside the applicable 3-year statute of limitations. In the context of their motion for summary disposition, defendants bore the burden of establishing the staleness of Sanderson's claim. *Tumey v City of Detroit*, 316 Mich 400, 410-411; 25 NW2d 571 (1947); *Guardian Industries Corp v Dept of Treasury*, 198 Mich App 363, 378; 499 NW2d 349 (1993). Because they failed to adduce evidence establishing that Sanderson discovered his condition outside the statute of limitations, defendants were not entitled to summary disposition under MCR 2.116(C)(7). *Larson, supra*.

III.

In case 185004, plaintiffs argue that the trial judge erred by applying the 2-year Alaskan statute of limitations pursuant to Michigan's borrowing statute, MCL 600.5861; MSA 27A.5861. We find no error. Mr. Lajiness was a resident of Alaska. His cause of action accrued in Alaska. Under the borrowing statute his cause of action was time-barred after either the Michigan or Alaskan limitations period had run. MCL 600.5861; MSA 27A.5861; *Hover v Chrysler Corp*, 209 Mich App 314, 317-318; 530 NW2d 96 (1995).

IV.

Finally, Mr. and Mrs. Lajiness argue that the trial judge erred by finding that their claims were barred by Alaska's 2-year statute of limitations. We disagree. The relevant Alaskan statute, AS 09.10.070, required that plaintiffs' action be brought within two years after it accrued. *Cameron v State*, 822 P2d 1362, 1365 (Alaska 1991). In *Cameron*, the Supreme Court of Alaska explained that state's discovery rule as follows:

(1) a cause of action accrues when a person discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action.

(2) a person reasonably should know of his cause of action when he has sufficient information to prompt an inquiry into the cause of action, if all of the essential elements of the cause of action may reasonably be discovered within the statutory period at a point when a reasonable time remains within which to file suit. [822 P2d at 1366].

However, the limitations period may be tolled:

where a person makes a reasonable inquiry which does not reveal the elements of the cause of action within the statutory period at a point where there remains a reasonable time within which to file suit, the limitations period is tolled until a reasonable person discovers actual knowledge of, or would again be prompted to inquire into, the cause of action. [822 P2d at 1367.]

We conclude that Mr. Lajiness was on inquiry notice at least by May 9, 1991. Mr. Lajiness was examined by a physician in May 1991 following an x-ray for asbestos-related disease. The physician's May 9, 1991 report states that Mr. Lajiness's chest x-ray showed conditions "suggestive of asbestos disease" and concluded that he had "probable asbestos pulmonary and pleural disease" although he did not suffer "significant impairment from this asbestosis at this time." A reasonable person, upon learning these facts, would have been alerted that he had a potential cause of action based upon asbestos exposure. Mr. and Mrs. Lajiness did not file their complaint until February 10, 1994, over 3 years after it accrued. Their claims were time-barred under AS 09.10.070.

We reverse the trial court's order granting defendants summary disposition against Mr. Sanderson in case 185003, and remand that case to the circuit court. We affirm the trial court's order granting defendants summary disposition against Mr. and Mrs. Lajiness in case 185003. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan